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Eviction Procedures in Public Housing

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EVICTION PROCEDURES IN PUBLIC HOUSING

An emerging legal problem concerns the relationship between a public housing authority and its tenants with respect to the procedural requirements necessary for the authority to terminate tenancies. The issue is of paramount importance to the more than 2,100,000 people who are currently living in various types of low-rent public housing.[1] With vast increases in public expenditures planned for the future,[2] the issue takes on greater sociological importance.

In *Vinson v. Greensburgh Housing Authority*,[3] plaintiffs sought to stay summary eviction proceedings and to annul a determination of the housing authority terminating their lease. The lease was a typical month-to-month periodic tenancy terminable by either party upon giving requisite notice. The authority gave the required one month's notice; upon refusal of the tenant to vacate it instituted summary eviction proceedings.[4]

The plaintiffs argued that they had fully complied with the authority's own regulations pertaining to tenant's rights to continue occupancy, and that the failure of the authority to state specific reasons for its action was a violation of the tenant's right to due process of law.[5] The authority argued that it was not required to give any reason for its action, and that the determination was neither a judicial nor a quasi-judicial act and hence not reviewable by the court.[6]

The court held that a tenant's right to continued occupancy may not be arbitrarily terminated by a state-created municipal housing authority exercising its express contractual power of termination. The court required that the authority fully articulate the grounds upon which it made its determination and that these grounds be reasonable.[7] The termination must not rest upon mere whim or caprice.[8] In dictum the court qualified its decision by stating that the authority's power should not be restrained in situ-

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1. Friedman, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642 (1966).
2. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 203 (July 25, 1968).
3. 29 App. Div. 2d 388, 288 N.Y.S.2d 159 (1968).
4. *Id.* at 392, 288 N.Y.S.2d at 161.
5. *Id.* at 394, 288 N.Y.S.2d at 162.
6. *Id.* at 394, 288 N.Y.S.2d at 162.
7. *Id.* at 398, 288 N.Y.S.2d at 164.
8. *Id.* at 396, 288 N.Y.S.2d at 163.

ations where the termination is reasonable and is required for the betterment of the entire housing community.[9]

The dissent in *Vinson* argued that in the absence of express legislation the procedural requirements which the authority must follow need only be that which is required of a private landlord. To require the authority to submit to interrogation and investigation would be an unreasonable burden.[10] The dissent also stated that the standard applied should be based upon common law requirements.

To fully understand the issue involved in *Vinson*, it is necessary to examine the common law of landlord and tenant with respect to procedural requirements necessary for terminating a periodic tenancy.

Landlord's Power to Terminate Periodic Tenancy Under Common Law

The month-to-month periodic tenancy found in *Vinson* is utilized by most housing authorities throughout the United States.[11] It is a variation of the older tenancy-at-will.[12] The periodic tenancy appeared to develop from a desire to avoid some of the harshness of the tenancy-at-will.[13] This harshness concerned the tenant's rights to emblements[14] upon the termination of a tenancy-at-will- by the landlord.[15] Even though the landlord may have validly terminated this type of tenancy, this right assured the tenant the use of the land until maturity of the crop without liability for rent. From the tenant's viewpoint, occupancy after termination was undesirable because it limited his rights to use the land expressly to gathering the crops. Faced with these undesirable consequences, the common law courts developed the periodic tenancy.[16]

Because it is the nature of the periodic tenancy to continue indefinitely, the common law applied strict rules relating to the

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9. *Id.* at 396, 288 N.Y.S.2d at 163.
10. *Accord*, Brand v. Chicago Housing Authority, 120 F.2d 786 (7th Cir. 1941).
11. Friedman, *supra* note 1, at 660.
12. Marcus, *Periodic Tenancies*, 7 Ford. L. Rev. 167 (1938).
13. 1 H. Tiffany, The Law of Landlord and Tenant 121 (1912).
14. The vegetable chattels called "emblements" are the corn or other growth of the earth which are produced annually, and not spontaneously, but by labor and industry. . . ," Black's Law Dictionary 614 (4th ed. 1968).
15. 1 H. Tiffany, *supra* note 13, at 120.
16. The tenancy from year to year was probably developed to eliminate the disadvantages of the tenancy at will. The landlord was given the option of terminating the tenancy during a time in which the tenant would have sufficient notice to forestall seasonal replanting. Upon lawful termination the tenant's rights in the land were completely extinguished. If the landlord failed to give seasonable notification of termination, he was required to wait until the entire period had run for repossession. *Id.* at 121.

notice required to terminate the lease.[17] If there was an express power of termination vested in the landlord he could exercise it at any time, and the tenant had no defense to eviction. It was not necessary for the landlord to give any reason for the termination.[18] The tenant had no right to question his reason or attack his motivations.[19] Although the landlord's power to terminate remained substantially unhampered at common law, the tenant's obligation to pay rent was sometimes suspended through the application of the doctrine of constructive eviction.[20]

There were broad policy considerations underlying the common law rule which left the landlord's power of termination substantially unrestricted. They reflected the socio-economic pressures under which the Anglo-American legal system developed. Prior to the industrial revolution in England free alienability of land was not desired by the feudal lords who sought to prepetuate their family fortunes by assuring that the primary measure of wealth, the land, remained in family possession.[21] Disintegration of the feudal system and emergence of the industrial revolution created an atmosphere conducive to free alienability of land. As wealth became more common the land continued to retain its intrinsic uniqueness as a measure of wealth, but became more susceptible to economic pressures of the market.[22]

Unlike England, land in the United States has always been relatively plentiful. Being in sufficient supply, it was generally possible to purchase whatever land was desired. The price paid

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17. Hartnip v. Fields, 247 Wis. 473, 19 N.W.2d 878 (1945), which holds that not only must a thirty days notice be given to terminate a month-to-month periodic tenancy, the period upon which the notice expires must coincide with the date the rent is due.

18. *E.g.*, Angel v. Black Band Consolidated Coal Co., 96 W. Va. 47, 122 S.E. 276 (1924).

19. See, *e.g.*, Gabriel v. Bowary, 234 Mass. 231, 85 N.E.2d 435 (1945); Metropolitan Life Ins. Co. v. Carroll, 43 Misc. 2d 639, 251 N.Y.S.2d 693 (Sup. Ct. 1964); Stapelton v. Horton, 183 Pa. Super. 198, 130 A.2d 250 (1957).

20. The tenant could move without liability for rent if his occupancy of the premises was so interfered with that he was forced to discontinue the tenancy, *e.g.*, Automobile Supply Co. v. Scene-in-Action Corp., 340 Ill. 196, 172 N.E. 35 (1935). For the principal to operate, however, it was necessary for the tenant to vacate, *see* Polumbo v. Olimpia Theaters, 278 Mass. 84, 176 N.E. 815 (1931).

21. R. MEGARRY, THE LAW OF REAL PROPERTY 80 (1957). The feudal lords brought pressure on Parliament which resulted in the creation of the Fee Tail, limiting the alienation of the land by the heir, Statute De Donis Conditionalibus (1285).

22. The common law for centuries has favored the policy of free alienability; a policy which has since been recognized by a statute, *id.* n.18.

for the land varied with the market pressure of demand as land has been generally susceptible to the pressure of the market.

A competitive market required that the supply of real property remains as fluid as possible.[23] Restraints on land such as leaseholds tended to limit the supply. Leaseholds were necessarily held valid but were strictly limited to the terms of the agreement.[24] The landlord was given the prerogative of allocating his land as he desired, subject only to limitations of public policy.[25]

An essential factor in promoting the economically desirable competitive market was the landlord's power to unburden his property from a tenancy. The supply of real property free of restraints would then be able to react to the demand, resulting in an effectively competitive market.[26]

Another basic policy underlying the common law rule as to leaseholds was the landlord's right to freedom of contract. Although related to the economic policy, this goal is based on somewhat different foundations.[27] The concept of freedom of contract developed from the traditional Anglo-Saxon respect for the individual.[28] The right to freedom of contract has been limited, however, when the enjoyment of the right contravenes public policy.[29]

Further Limitations on the Landlord's Common Law Power of Termination

The common law rule allowing the landlord almost unrestricted termination powers over leases is based on sound economic and social policy when applied to situations involving solely private individuals. There have been, however, limitations placed on the rule which have restricted it.[30] These limitations have been

23. The total supply of land is constant, only that portion of the supply free of restraint varies and is affected by pressures of demand.

24. The parol evidence rule renders inadmissible all oral or written modifications entered into prior to the written contract, and contemporaneous oral modifications if that contract is intended to be a final and complete expression of the relationship between the parties, *see* L. Simpson, Handbook of The Law of Contracts § 98, at 195 (2d ed. 1965).

25. The landlord was required at common law to refrain from using his land so as to create either a public or private nuisance. The landlord was also required to refrain from employing his property in any illegal manner.

26. The competitive market was desirable because its operation assures that the greatest use of the land will be accomplished at the lowest possible rent.

27. Freedom of contract developed from the basic political freedoms enjoyed by the English, stemming originally from the Magna Carta.

28. Naturally, the serfs in England were limited in their freedom of contract through the Middle Ages, but as the industrial revolution disrupted the earlier social system, eventually, even these people were able to make the contracts they desired.

29. Contracts which are violative of public policy usually involve an illegal subject matter, and as such the court will not enforce them.

30. *See also* Edwards v. Habib, 125 U.S. App. D.C. 49, 227 A.2d 388 (1967).

imposed where either the courts or the legislature have concluded that the common law rule is inadequate in unique situations.

One type of limitation on the landlord's power to terminate involves rent control legislation.[31] The primary purpose of this legislation is to insure that the competitive market for housing would remain stable during periods when the demand for such housing greatly exceeds the supply.[32] The landlord is required by statute to comply with specific regulations established by the housing administrator to effectuate the termination of the tenant's occupancy.[33] The landlord is required to state reasons for his actions and these reasons could be rejected by the administrator. This type of legislation is constitutional.[34]

Similarly, laws which empower welfare agencies to withhold rent from the private landlord, by placing the rent in escrow accounts, are constitutional.[35] New York and Pennsylvania have such statutes.[36] The Pennsylvania statute empowers an official[37] to certify a dwelling as unfit for human habitation. Upon such certification the duty to pay rent to the landlord is suspended. The tenant, however, is required to pay the rent into an escrow account.[38] The statute states: "No tenant shall be evicted for any reason whatsoever while rent is deposited in escrow."[39] The land-

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31. 50 U.S.C. App. § 1894 (1951) (repealed 1953).

32. The purpose underlying the policy of rent control is that in a period of scarcity of living accommodations tenants who used such accommodations as their homes are not to be subjected to high rental rates which free competition produces; *see* Woods v. Polino, 86 F. Supp. 65 (S.D. W. Va. 1949).

33. The landlord was required to apply for a certificate of eviction if he desired to effectuate termination. The document was then issued by the housing administrator if in his discretion such termination was warranted; *see* Calvin v. Martin, 64 Ohio L. Abs. 265, 111 N.E.2d 786 (Ohio App. 1952).

34. Block v. Husch, 256 U.S. 135 (1921).

35. Schaeffer v. Montes, 37 Misc. 2d 722, 233 N.Y.S.2d 444 (Civ. Ct. N.Y.C. 1962), which held that the Spiegel Bill, SOCIAL WELFARE LAW § 143-b (McKinney 1966) was constitutional. The Spiegel Bill allows a tenant who is receiving welfare allotments to withhold payment of rent from a landlord who fails to maintain the premises. The tenant deposits the rent in an escrow account administered by a welfare official.

36. SOCIAL WELFARE LAW, § 143-b (McKinney 1966); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1967).

37. The Pennsylvania statute empowers officials of the Department of Licenses, Public Safety, or Public Health Department to collect the rent to be put into escrow accounts.

38. The Pennsylvania statute is broader than New York's legislation. While New York limits its Act to tenants who are recipients of social welfare allotments, Pennsylvania's legislation applies to all tenants who live in certain class cities.

39. PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1967).

lord's power of termination is clearly limited by this form of legislation.

The landlord's power of termination has also been limited where termination is used to restrict a legal right which the legislature has conferred on the tenant.[40] Most of these cases have arisen because of a violation of the tenant's civil rights under federal law. Similarly, the landlord may have the power to terminate but the right to exercise that power is subject to statutory modification.[41] In *In re Quarles*[42] the United States Supreme Court ruled that it was unlawful to conspire to interfere with legislative rights granted to an individual.[43]

Finally, there are cases in which the landlord's power of termination is restricted because it is a governmental agency. *Vinson v. Greensburgh Housing Authority* is such a case. These cases turn on a legal distinction between the public authority and the private landlord.[44]

In *Rudder v. United States*[45] the government, as the landlord, attempted by authority of the Gwinn Amendment[46] to evict a tenant because he refused to sign a certificate of non-membership in

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40. United States v. Beaty, 288 F.2d 653 (6th Cir. 1961). The court stated that the Civil Rights Act, 42 U.S.C. § 1971(a) (1964), was violated by the defendants. The court stated,

> . . . threats and intimidations may take on many forms. . . . The evidence amply supports the government's claim that a part of the plan . . . to intimidate negro voters, for the purpose of interfering with their rights of registering and voting, was to have them evicted from the land they occupied as tenants.

Id. at 256. *See* Abstract Investment Co. v. Hutchinson, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309 (Dist. Ct. App. 1962) (held that a landlord may not evict a tenant on the basis of race).

41. N.L.R.B. v. Lamar Creamery Co., 246 F.2d 8 (5th Cir. 1957); John Hancock Mutual Life Insurance Co. v. N.L.R.B., 89 U.S. App. D.C. 261, 191 F.2d 483 (U.S. Ct. App. D.C. 1951), where the courts in applying the National Labor Relations Act, that it was an unfair labor practice for an employer to deny continued employment to one who has filed charges against him.

42. 158 U.S. 532 (1895).

43. *Id.* at 537. The right involved in *In re* Quarles was the right to inform a United States Marshal of violations of the Internal Revenue Law.

44. Rudder v. United States, 226 F.2d 51 (D.C. Cir. 1955); Housing Authority of Los Angeles v. Cordova, 130 Cal. App. 2d Supp. 883, 279 P.2d 215 (1955), *cert. denied*, 350 U.S. 969 (1955); Housing Authority of Chicago v. Blackman, 4 Ill. 2d 319, 122 N.E.2d 522 (1954); Kutcher v. Housing Authority of Newark, 20 N.J. 181, 119 A.2d 1 (1955); Peters v. New York Housing Authority, 1 App. Div. 2d 694, 147 N.Y.S.2d 859 (1955); Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N.W.2d 605 (1954), *cert. denied*, 350 U.S. 882 (1955).

45. 226 F.2d 51 (D.C. Cir. 1955).

46. Acts of July 5, 1952, ch. 302, § 101, 67 Stat. 307. The statute states,

> that no housing unit constructed under the United States Housing Act of 1937, as amended, shall be occupied by any person who is a member of an organization designated subversive by the Attorney General: Provided further, that the foregoing prohibition shall be enforced by the local authorities. . . .

Note: this legislation lapsed and was not renewed after 1954.

certain alleged subversive organizations. The court held that the evictions were violative of due process of law because the tenant was given no fair hearing and was not proven to be a subversive within the meaning of the Amendment.[47] The court stated: "The government as landlord is still the government. It must not act arbitrarily, for unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process of law."[48] The reluctance of the courts to allow terminations under the Gwinn Amendment has resulted in reversals of numerous evictions.[49]

Courts have been very reluctant to apply the due process limitations beyond the particular facts of the Gwinn Amendment cases. In *Housing Authority of Pittsburgh v. Turner*[50] the court, in determining whether a public housing authority should be required to give reasons for its termination of a lease, concluded that the due process requirements of the Gwinn Amendment cases were not applicable to a case of routine termination.[51] The *Turner* court sidestepped the requirements of due process by stating that the Gwinn Amendment cases only required a hearing and notice of reasons for termination because the tenant was forced to comply with an unconstitutional requirement.[52] The court implied that in a "routine" termination no unconstitutional requirement is forced on the tenant; therefore, the Gwinn Amendment cases are not on point.[53]

It has also been ruled that it is unnecessary for a public housing authority to allege any objectionable behavior by the tenant to make out a *prima facie* case in eviction proceedings.[54]

Statutory Requirements

It is the express policy of the United States Housing Act of 1937[55] to

47. 226 F.2d 51, 53 (D.C. Cir. 1955).
48. *Id.*
49. Cases cited note 44 *supra.*
50. 201 Pa. Super. 62, 191 A.2d 869 (1963).
51. In *Turner* the court relied on a series of cases which have not required the public housing authority to give any reasons for the termination involved. Accord, Walton v. City of Phoenix, 69 Ariz. 26, 208 P.2d 309 (1949); Chicago Housing Authority v. Ivory, 341 Ill. App. 282, 93 N.E.2d 386 (1950); Columbus Metropolitan Housing Authority v. Simpson, 85 Ohio App. 73, 85 N.E.2d 560 (1949); Columbus Metropolitan Housing Authority v. Stires, 84 Ohio App. 331, 84 N.E.2d 279 (1949).
52. 201 Pa. Super. at 68, 191 A.2d at 871.
53. *Id.*
54. *See* New York Housing Authority v. Russ, 1 Misc. 2d 170, 134 N.Y.S.2d 812 (Sup. Ct. 1954).
55. 42 U.S.C. §§ 1401-36 (1964).

> vest in the local housing agencies the maximum amount of responsibility in administering the low-rent housing program, including the establishment of rents and eligibility requirements (subject to the approval of the Authority), with due consideration to accomplish the objectives of this chapter. . . .[56]

Courts have interpreted this policy as an authorization for the states to manage their own housing programs in any reasonable manner. The procedural requirements necessary to effectively terminate tenancies also has been left largely to state discretion.[57]

To be eligible for federally appropriated low-rent housing funds, each state is required to draft its own public housing law.[58] The states then delegate to local authorities the powers necessary to effectuate the program. The express powers which the states vest in the individual housing authorities involve a broad scope of administrative discretion.[59] The local authorities are the primary rule-making bodies and are given the power by state statute to promulgate necessary regulations and to control the actual requirements for termination.[60]

The power of the local authority to issue regulations is not unlimited; it must comply with the statutory standards under which it was created. The regulations are either in harmony with these standards, or they are an abuse of discretion. The courts apply judicial review to limit the abuse of discretionary power by the local authorities.

In *Sanders v. Cruise*[61] the court limited a housing authority's regulatory powers to terminate a lease. The tenants were ordered to vacate their apartment on the grounds that they were "undesirables" under the enacted regulations.[62] The authority cited as

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56. *Id.* § 101.

57. The discretionary power of the states in determining procedural requirements has recently been sought to be limited, see discussion of Department of Housing and Urban Development's Circular *infra* p. .

58. Examples of these statutes are, N.J. STAT. ANN. §§ 55:14A3151-58 (1964); PUBLIC HOUSING LAW §§ 1-518 (McKinney Supp. 1968); PA. STAT. ANN. tit. 35, §§ 151-1700 (Supp. 1967).

59. The Pennsylvania statute is typical of the broad powers which have been conferred on the public housing authority. PA. STAT. ANN. tit. 35 § 1550(K) (Supp. 1967) authorizes the authority: "To lease or rent any of the dwellings or any other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project, and (subject to the limitations contained in this act) to establish and revise the rents or charges therefor."

60. The public housing authority's regulations are strictly a matter of the local administrations discretion, subject only to the broad statutory policy upon which the authority was granted its powers, for an example of particular regulation relative to requirements for continued occupancy *infra* note 62.

61. 10 Misc. 2d 533, 173 N.Y.S.2d 871 (Sup. Ct. 1958).

62. Resolution 53-6-417 adopted June 25, 1953, as amended, requires that the:

> standard to be used in approving the eligibility for continued occu-

the reason for its action the conviction of the tenant's son for using narcotics. The termination was effected although the son had not been living with his parents for more than a year. The court in reviewing the authority's decision disallowed the termination on the basis that it was patently unreasonable in light of the authority's own regulations.[63]

Since the authority in *Sanders* gave the reasons upon which it based its determination, the court did not decide the precise issue of procedural requirements. The case does imply that a standard of reasonableness is required of a public housing authority when it exercises its power of termination.[64]

Attempt to Clarify the Area

The Department of Housing and Urban Development[65] issued a Circular attempting to clarify the procedural requirements necessary for a public housing authority to effectuate termination of leases.[66] The Circular states that notice of the reasons for termi-

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pancy of a family upon such ground shall be that, in light of its conduct and behavior while residing in the project, the family does not constitute (1) a detriment to the health, safety or morals of its neighbors or the community, (2) an adverse influence upon sound family and communal life, (3) a source of danger of a cause of damage to premises or property of the Authority, (4) or a source of danger to the peaceful occupation of the other tenants or (5) a nuisance.

Id. at 535.

63. 10 Misc. 2d at 537, 173 N.Y.S.2d at 875.

64. 10 Misc. 2d at 535, 173 N.Y.S.2d at 874.

65. Hereinafter cited as H.U.D.

66. The Circular "Terminations of Tenancies in Low-Rent Projects" states, in part:

> Since this is a federally assisted program, we believe it essential that no tenant be given notice to vacate without being told by the local authority, in a private conference or other appropriate manner, the reasons for eviction, and be given an opportunity to make such reply or explanation as he may wish. In addition to informing the tenant of the reasons for any proposed eviction action, from this date each Local Authority shall maintain a written record of every eviction from the federally assisted public housing. Such records are to be available for review from time to time by H.U.D. representatives and shall contain the following information:
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> 1. The name of the tenant and identification of unit occupied.
> 2. Date of notice to vacate.
> 3. Specific reason(s) for notice to vacate. For example, if a tenant is being evicted because of undesirable actions, the record should detail the actions which resulted in the determination that the eviction should be instituted.
> 4. Date and method of notifying tenant with summary of any conferences with tenant, including names of conference participants.
> 5. Date and description of final action taken.

H.U.D. Circular, February 17, 1967.

nations and hearings be given by the authority.[67] The legal effect of the Circular is still uncertain.[68] Some courts have elected to follow its requirements;[69] others have held it does not enlarge the rights of the tenants.[70]

Lancaster Housing Authority v. Gardner[71] is an example where the court ruled the Circular inapplicable. In *Gardner* the court stated:

> The Circular does not enlarge the rights of tenants or curtail those of the Authority-Landlord. It merely assures the tenants that their continued occupancy is not dependent upon compliance with unconstitutional requirements. . . .[72]

In *Williams v. Housing Authority of Atlanta*,[73] where the Circular's effect was also raised, the court ruled that the directive's requirements were fulfilled. There was sufficient compliance where the administrator of the authority had stated the reasons for the authority's action in a pretrail deposition which was made available to the tenant.[74]

The precise issue of the Circular's legal effect is now pending before the United States Supreme Court in *Thorpe v. Housing Authority of Durham*.[75]

THE THORPE CASE

While a number of cases have sought to test the procedural requirements followed by housing authorities in terminating leases,[76] *Thorpe*[77] is the leading case on this issue. There a tenant

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67. *Id.*

68. The issue of Circular's precise legal effects is now pending before the United States Supreme Court *infra* note 75.

69. Vinson v. Greensburgh Housing Authority, 29 App. Div. 2d 388, 288 N.Y.S. 159 (1968). *See* WEL. L. BULL., Index 5 (March 1968).

70. See Chicago Housing Authority v. Stewart, No. 40796. (Ill. Sup. Ct. May 29, 1968) where the court refused to allow the Circular to have any effect on the requirements necessary for the authority to terminate the tenant's lease. The court scorned the idea that the H.U.D. Circular had any legal effect calling it "a mere departmental policy adopted in the interest of good public relations," 14 WEL. L. BULL. 10 (Sept. 1968).

71. 211 Pa. Super. 502, 240 A.2d 566 (1968). In this case the tenant sought to reverse a determination of the authority to terminate her lease because she claimed she was denied a hearing which was required under the H.U.D. Circular.

72. *Id.* at 507, 240 A.2d at 268.

73. 223 Ga. 407, 155 S.E.2d 923 (1967).

74. 155 S.E.2d at 167.

75. 267 N.C. 431, 148 S.E.2d 290 (1966), *vacated and remanded*, 386 U.S. 670 (1967), *aff'd on rehearing*, 271 N.C. 468, 157 S.E.2d 147 (1968), *cert. granted*, 390 U.S. 942 (1968).

76. *E.g.*, Trotman v. Syracuse Housing Authority, No. 68-CV-66 (N.D. N.Y., filed Feb. 20, 1968); Quevedo v. Collins, No. CA-3-2626-C (N.D. Tex., Order filed July 12, 1968). These are cases in which the tenants have questioned the administrative procedures by which the authority has terminated the tenants' right to continue occupancy. See also 11 WEL. L. BULL. 5 (Jan. 1968).

77. Case cited note 75 *supra*.

in a public housing project attempted to organize a tenants' association. The authority learned of these activities and gave contractually valid notice of termination. The tenant appealed the subsequent eviction on the basis of a violation of due process of law. The tenant argued it was unconstitutional to be denied a hearing in situations where a public housing authority terminates a lease. The state court rejected the tenant's argument and upheld the eviction.[78] The tenant appealed to the United States Supreme Court. Prior to the argument, but after the briefs were filed, H.U.D. promulgated its Circular on the procedural requirements for termination of tenancies in public housing.[79]

The tenant in *Thorpe* argued that the Circular's requirements should be applied to the pending case. The United States Supreme Court vacated the state court's decision and remanded the case, ". . . for such further proceedings as may be appropriate in light of the . . . Circular. . . ."[80] But the Court stated that: "The legal effect of the Circular, the extent to which it binds local authorities, and whether it is in fact applicable to the Petitioners are questons we do not decide."[81] Because the Circular was issued *after* the state court's decision, the Court ruled it was inappropriate for it to decide the precise issue of the Circular's legal effect before the state court had the opportunity to apply H.U.D.'s directive to the pending case.

The state court then reheard *Thorpe* and affirmed its prior decision holding that the Circular did not have retroactive effect and therefore was not applicable to the case.[82] The tenant has again appealed from the state court's decision and certiorari has been granted by the United States Supreme Court.[83] In rehearing *Thorpe* the Supreme Court should clarify the legal effect of the Circular's procedural requirements in that the Court will decide whether the tenant was denied due process by a denial of the type of rehearing required by the Circular.[84]

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78. 267 N.C. 431, 148 S.E.2d 290 (1968).
79. H.U.D. Circular, cited note 66 *supra*.
80. 386 U.S. 670, 674.
81. *Id.* at 673.
82. 271 N.C. 468, 157 S.E.2d 147 (1968).
83. 390 U.S. 942 (1968).
84. 37 U.S.L.W. 3012 (U.S. July 2, 1968). The Court has decided to specifically rule on: (1) whether the tenant was deprived of due process of law by the authority's refusal to grant a hearing and give notice of its reasons for the termination; and (2) whether the tenant has the legal right to a hearing and notice by virtue of the Directive.

As stated previously, whether a housing authority has the right to terminate a lease agreement without stating its reasons or allowing for a hearing has *traditionally* been decided affirmatively on the grounds of freedom of contract.[85] The proponents of this view argue that the mere fact that the landlord happens to be the government is immaterial.[86] When specific conditions are set forth in the lease, both parties are legally bound to comply with them.[87] The contention that the government or administrative agency should be treated differently in contract matters would appear to be refuted by language in *Lynch v. United States*:[88] "When the United States enters into contract relations, its rights and liabilities therein are governed *generally* by the law applicable to contracts between private individuals."[89] This case is often cited by those courts which have held the authority to have the same right to terminate a tenancy as that possessed by a private landlord.[90]

This reasoning is open to attack. The traditional argument that the public landlord should be treated in the same manner as his private counterpart is an unsound economic equation. The economic policy upon which the public housing program is based varies considerably from the policy upon which private landlord tenant law is based. Profit motivation is the ultimate economic policy upon which the law with respect to the private landlord is based. The law enables the private landlord to substitute a new tenant for the old. The new lessee may be willing to pay a higher rent, thus the landlord's profit will be increased given constant costs. It is the express function of the public authority to provide the most suitable housing at the lowest rent possible; profit motivation is not involved. When rent revenues of the authority are exceeded by its expenses, the deficit is balanced by government subsidies. The goal is social welfare not higher rents. Therefore, there is no sound economic reason for treating the public authority and private landlord in the same legal manner.

Further recognition should be given to the fact that statutory authorization is the primary base upon which an authority operates.[91] The argument that parties in a public housing lease are bound by the limitations of the contract fails to fully recognize this point. In *Vinson* the court stated: "The statute consequently

85. Cases cited note 51 *supra.*
86. *Id.*
87. *Id.*
88. 292 U.S. 571 (1934).
89. *Id.* at 579 (emphasis added).
90. *E.g.*, Turner v. Housing Authority of Pittsburgh, 201 Pa. Super. 62, 191 A.2d 869 (1963); Vinson v. Greensburgh Housing Authority, 29 App. Div. 2d 388, 288 N.Y.S.2d 159 (1968) (dissent).
91. Statute cited note 59 *supra.*

enters into and becomes part of the lease; and its spirit and intent must be the guiding beacon in the interpretation of the terms of the lease."[92] In *New York Housing Authority v. Russ*[93] it was stated by the dissent that, ". . . the 'lease agreement' is only part of the actual agreement, for it appears by the following 'rules and regulations' . . . that every tenant is required to comply with 24 rules and regulations."[94] The lease should be viewed in the full prospective of its statutory authorization, the policy behind the statute, and the rules and regulations under which it is administered.

On closer examination it would appear that the case of *Lynch v. United States*[95] would actually support a similar viewing of government contracts in this policy perspective. In *Lynch* the government attempted to cancel outstanding war insurance contracts on veterans. The Court ruled that the government had the power to cancel these contractual obligations, but were nevertheless liable because the remedy for their breach remained unimpaired.[96] In requiring the government to abide by its contractual obligation, the Court stated that under certain circumstances the government might totally abrogate its duties in contracts. These situations involve the exercise of the police power or some other valid policy.[97] But implied in *Lynch* is the requirement that in considering the rights and liabilities in any contract in which the government is a party, it is necessary to consider the policy factors upon which the contract is based.[98] Applying this latter rule to public housing leases, policy factors would disallow an equation of a public housing authority to a private landlord. The relationship of government and public tenant is uniquely based on policy factors which should affect the contractual rights and liabilities of the parties.[99]

Further, a public housing authority is an administrative agency; as such it is governed by the same rules which apply to all administrative bodies. In terminating a tenant's right to continue

92. 29 App. Div. 2d at 396, 288 N.Y.S.2d at 163.
93. 1 Misc. 2d 170, 134 N.Y.S.2d 812 (Sup. Ct. 1954).
94. *Id.* at 172, 134 N.Y.S.2d at 814.
95. That the government should be treated generally in the same manner as a private individual in contractual relations, 292 U.S. 571 (1934). See discussion p. 318 *supra.*
96. 292 U.S. 571, 581.
97. *Id.* at 579.
98. 292 U.S. 571, 581. In *Lynch* it was stated that in contracts in which the government is a party the rights and liabilities under the agreement may be modified by an exercise of the ". . . federal police power or some other paramount power." 292 U.S. 579.
99. The comparison of these factors, economic and political, reveals substantial differences. See p. 309 *supra.*

occupancy, a public housing authority should give the tenant a right to present a defense to the termination.[100] An analogy may be drawn to *Hornsby v. Allen*[101] where the plaintiff was refused a liquor license without a stated reason or hearing. The *Hornsby* court stated:

> [W]hen a municipal or other governmental body grants a license it is an adjudication that the applicant has complied with the prescribed standards for the award of the license. Similarly, the denial of a license is based on an adjudication that the applicant has not satisfied these qualifications and requirements.[102]

A parallel may be drawn between the right of an applicant to be issued a liquor license, and the tenant to continue occupancy of an apartment which the government has, in effect, granted to him. In both cases the administrative body applies a set of legal criteria, qualifications, and requirements to an individual and makes a decision which affects the individual's rights.

The *Hornsby* court concluded that because the administrative act in question consisted of the determination of factual issues and the application of legal criteria to them, a judicial act in which the fundamental concepts of due process of law are applicable. Due process of law in administrative proceedings of a judicial nature must conform to fairness inherent in Anglo-Saxon jurisprudence.[103]

There have been other analogous areas requiring a hearing in administrative adjudications.[104] For example, in *Standard Airlines v. C.A.B.*[105] the court reviewed an administrative adjudication which revoked the airline's letter of registration, which was required for operations. The court remanded the case because the agency failed to give the airlines an opportunity to state its reasons why the letter should not be revoked.[106]

These administrative law cases demonstrate that a hearing is required if the individual is to have an opportunity to hear charges against him and to offer him an opportunity to defend himself. By similarly requiring a public housing authority to state its reasons for termination of occupancy and providing for a hearing,

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100. DAVIS, ADMINISTRATIVE LAW TEXT 119 (1959), states: "When adjudicative facts are in dispute, our legal tradition is that the party affected is entitled not only to rebut or explain the evidence against him but also to 'confront his accusers,' and to cross-examine them."

101. 326 F.2d 605 (5th Cir. 1964).

102. *Id.* at 608.

103. *Id.*

104. 177 F.2d 18 (U.S. Ct. App. D.C. 1949).

105. *Id.* at 21.

106. *E.g.*, Morgan v. United States, 304 U.S. 1 (1938) (Dept. of Agriculture setting commodity rates); Standard Airlines v. C.A.B., 177 F.2d 18 (U.S. Ct. App. D.C. 1949) (certificate of operation); Tadano v. Manny, 160 F.2d 665 (9th Cir. 1947) (deportation proceeding); Perpente v. Moss, 293 N.Y. 325, 56 N.E.2d 726 (1944) (license to conduct employment agency).

the individual would be given the opportunity to know why he is being evicted and voice a defense. Securing due process of law for the tenant in public housing will only result where there is a procedure by which all the facts in controversy are brought out.

CONCLUSION

Considering the present state of the law in the area of procedural requirements for termination, it is apparent that there is a need for new rules in public housing. The judicial imposition of a reasonableness test as suggested in *Vinson* points in the correct direction. But legislative action would appear to be the most desirable solution to achieve clarity. H.U.D.'s Circular offers a middle ground of administrative action by requiring a statement of reasons and hearing in terminations. But the impact of the Circular has been weakened by decisions which circumvent its requirements by distinguishing the facts in their particular cases. A ruling by the Supreme Court in *Thorpe* affirming the binding nature of the Circular would go far in achieving these procedural requirements.[107]

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107. During the publication stages of this paper the United States Supreme Court rendered its decision in *Thorpe v. Housing Authority of Durham*, 37 U.S.L.W. 4068 (U.S. Jan. 13, 1969). The Court decided that H.U.D.'s Circular was mandatory and that local housing authorities are required to comply with its requirements in terminating tenancies. The Court further stated that, with respect to *Thorpe*, the Circular should be given retroactive effect. Citing the established rule that the appellate court should apply the law in effect at the time the decision is rendered, the Supreme Court reversed the state court's decision. Thus the notification procedure required by the Circular is made mandatory for all federally assisted housing projects.

The affirmation of the Circular in *Thorpe* definitely places real requirements upon the local authorites. But as seen in some of the recent cases, its requirements may be easily circumvented. It would appear that the final solution to this problem will rest with definite legislative standards promulgated either by the United States Congress or H.U.D. as more definite requirements.